



U.S. Department of Justice

Immigration and Naturalization Service

Ed

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[REDACTED]

FILE [REDACTED] Office: Providence (BOS)

Date:

AUG 22 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT:

[REDACTED]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly

Terrance M. O'Reilly, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The application was denied by the District Director, Boston, Massachusetts, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on April 3, 1969 in the Philippines. The applicant's father, [REDACTED] was born in the Philippines in September 1940 and acquired U.S. citizenship through his mother (the applicant's grandmother, [REDACTED]). The applicant's mother, [REDACTED] was born in the Philippines in March 1944 and was a national of the United States until July 4, 1946. The applicant's mother never had a claim to United States citizenship and she was an alien when the applicant was born. The applicant's parents married each other on September 29, 1962. The applicant claims that he acquired United States citizenship at birth under § 301(g) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1401(g).

The district director determined the record failed to establish that the applicant's United States citizen parent had been physically present in the United States or one of its outlying possessions for 10 years, at least 5 of which were after age 14, as required under § 301(g) of the Act, 8 U.S.C. 1401(g), at the time of the applicant's birth. The district director also determined that the applicant failed to qualify under § 322 of the Act, 8 U.S.C. 1433, because he was over the age of 18 years.

The district director noted that the Philippines was granted independence on July 4, 1946 so residence or physical presence in the Philippines on and after that date no longer qualifies as residence or physical presence in the United States as the term "United States" is defined in § 101(a)(38) of the Act, 8 U.S.C. 1101(a)(38). It is also noted that the applicant's father was never physically present in the United States prior to the applicant's birth. The record indicates that the applicant's father made his first visit to the United States in 1972 when he visited New York and San Francisco. The applicant's father learned of his claim to U.S. citizenship in the 1980's and was approved for U.S. citizenship registration on March 11, 1991.

On appeal, counsel discusses the retention requirements in effect on a child born abroad to a citizen parent and an alien parent between May 24, 1934 and December 24, 1952 and the applicant's acquisition of U.S. citizenship at birth under § 301(d) of the Act

The retention requirements in effect at the time of the applicant's father's birth in 1940 under § 201(g) and (h) of NA 1940, stipulated that a citizen child born abroad to one U.S. citizen and one alien parent, in order to retain United States citizenship, must demonstrate 5 years residence in the United States between ages 13 and 21. The Act of 1952 stipulated that such citizen born abroad must demonstrate 5 years of continuous physical presence in the United States between the ages of 13 and 28 in order to retain

citizenship. The Act of October 27, 1972, extensively liberalized the retention requirements extending back to birth abroad after May 24, 1934, and reduced the period of continuous physical presence to 2 years. The retention requirements were eliminated by an amendment to the Act effective October 10, 1978. Persons born on or after October 10, 1952, are relieved of the necessity of complying with any retention requirements.

A citizen under the age of 28 years who was subject to retention requirements who did not become aware that he was a United States citizen until he passed the age of 23 or 26 years, whichever was applicable, was not divested of his citizenship until he had a reasonable opportunity to come to the United States after first having learned of his U.S. citizenship to complete the balance of the period to age 28. Upon making a timely entry, the citizen is regarded as having been constructively physically present in the United States immediately prior to his 23rd or 26th birthday and as having fully complied with the retention requirements when his constructive physical presence and actual physical presence prior to age 28 years total 5 years or 2 years, as applicable.

When awareness did not come into existence in time to permit entry to be made before the age of 28 years, it was no longer possible to literally satisfy the retention requirements and no physical presence at all in the United States was required to retain citizenship. The applicant's father learned about his claim to U.S. citizenship in the 1980's and, therefore, he was not subject to the retention requirements.

Montana v. Kennedy, 278 F.2d 68, affd. 366 U.S. 308 (1961), held that to determine whether a person acquired U.S. citizenship at birth abroad, resort must be had to the statute in effect at the time of birth. Section 301(g) of the Act was in effect at the time of the applicant's birth.

Section 301. The following shall be nationals and citizens of the United States at birth:

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States.

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less

than 10 years, at least 5 of which were after attaining the age 14 years, shall be nationals and citizens of the United States at birth.

Counsel emphasizes that the applicant's mother was a national of the United States pursuant to § 308 of the Act, 8 U.S.C. 1408. As indicated above, the applicant's mother was a national of the United States until July 4, 1946. She became an alien on that date and was an alien at the time of the applicant's birth, therefore, the applicant could not have acquired U.S. citizenship at birth under § 301(d) of the Act.

Although residence or physical presence in the Philippines after April 10, 1899 and before July 4, 1946 is considered residence or physical presence in an outlying possession of the United States for purposes of § 301(g) of the Act, the applicant's father having been born in September 1940 could only have accumulated 5 years and 10 months of physical presence prior to July 4, 1946 and none after he reached the age of 14 years.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence.

The applicant has not met this burden of establishing that his father had been physically present in the United States or an outlying possession for a total of 10 years, 5 of which were after the age 14. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.